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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection and)
Competition Act of 1992)
)
Broadcast Signal Carriage Issues)

MM Docket No. 92-259

COMMENTS

The Consortium of Concerned Wireless Cable Operators (the "Consortium"),¹ by counsel and pursuant to Section 1.415 of the Commission's Rules and Notice of Proposed Rule Making, MM Docket No. 92-259, FCC 92-499, released November 19, 1992 ("Notice"), hereby submits these Comments in connection with the Commission's implementation of the broadcast signal carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

Background

Section 325(b)(3)(A) of the Cable Act directs the Commission

¹ The Consortium consists of wireless cable operators that currently operate or are developing wireless cable systems, as follows: Broadcast Services International, Inc. (Ely, Minnesota; and Port Huron, Michigan), Countryside TV Management Services, Inc. (Caney, Kansas), Family Entertainment Network Partnership (Fargo, North Dakota; Windom, Minnesota; and Yankton, South Dakota), Green Bay Entertainment Network Partnership (Green Bay, Wisconsin; Appleton, Wisconsin; and Sheboygan, Wisconsin), MultiMedia Development Corp. (Las Cruces, New Mexico; and Santa Fe, New Mexico), Northeast Telecom, Inc. (Watertown, New York), People's Cable, Inc. (Lakeland, Florida), Rapid Choice TV, Inc. (Rapid City, South Dakota), Salisbury E MPSPG Partnership (Salisbury, Maryland), Skyline Entertainment Network (Spokane) L.P. (Spokane, Washington), SuperChannels, Inc. (Las Vegas, Nevada), and Wireless Entertainment Network Partnership (Grand Island, Nebraska; Kearney; Nebraska and Lincoln, Nebraska).

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to establish rules concerning the standards by which "television broadcast stations"² -- local, distant or superstation -- may grant consent to "multichannel video programming distributors" to retransmit the stations' signals.³ Congress found passage of this section of the Cable Act necessary to help preserve the system of free over-the-air television and compensate television stations for the retransmission of their signals. See House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Session (1991); House Committee on Energy and Commerce, H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992) ("Conference Report").

Cable operators are subject to both the "must carry" provisions of Section 614 of the Cable Act and the "retransmission

² As stated in the Notice, it is unclear whether Congress intended to distinguish between "broadcasting stations" and "television broadcast stations." See Notice at pp. 25-26, ¶43 & n. 56. Because the Cable Act generally focuses on video distribution and Section 325 of the Cable Act specifically focuses on a perceived imbalance between cable operators and television stations, the Consortium submits that the focus of this proceeding should address the relationship between television stations and cable systems.

³ Section 602(12) of the Cable Act defines a "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." (Emphasis added.) Because wireless cable operators make use of Instructional Television Fixed Service frequencies as well as Multichannel Multipoint Distribution Service frequencies, clarification of this point may be necessary.

consent" provisions of Section 325 of the Cable Act. Wireless cable operators, as "multichannel video programming distributors," are subject only to retransmission consent.⁴

Discussion

The rules to be adopted by the Commission in this proceeding likely will have a significant and lasting effect on the development and operation of wireless cable systems, especially in those markets where the video distribution marketplace is dominated by firmly-entrenched cable systems. The Cable Act leaves for the Commission to determine whether exclusive retransmission arrangements should be permissible, or whether such arrangements may unfairly discriminate against a multichannel provider. In order for wireless cable systems to effectively compete with cable systems on the local level and thus promote diversity and consumer choice, the Commission should adopt rules designed to ensure that all multichannel video programming distributors have access to television broadcast stations on fair and non-discriminatory terms and conditions. Exclusive, unfair and discriminatory retransmission

⁴ The term "wireless cable" is interchangeable with the term "multichannel multipoint distribution service" used in Section 602(12) of the Cable Act. In response to the Commission's request for comment on the definitional scope of "multichannel video programming distributor," the Consortium agrees with the Commission's assessment that the obligation to comply with Section 325 of the Cable Act rests with the operator rather than the licensees from which the operator may lease airtime. See Notice at p. 23, ¶ 42. In addition to those reasons cited by the Commission, placing the onus on each individual licensee would be unduly burdensome, and would undermine a wireless cable operator's ability to lease airtime from licensees on reasonable terms.

arrangements must be prohibited.⁵

The central public policy objective driving passage of the Cable Act and adoption of new FCC rules has been to promote competition and diversity in the video distribution marketplace. In the Conference Report, the conferees stated that "[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers." Conference Report at pp. 55-56.

In order for other multichannel video providers to compete with cable, they must be allowed to provide programming attractive to potential subscribers. To facilitate competition, Congress adopted Sections 12 and 19 of the Cable Act to guarantee multichannel video providers access to cable programming on fair and non-discriminatory terms and conditions. *Id.* at 93. For wireless cable operators seeking to compete with cable, access to television broadcast programming is as important, if not more important, as access to cable programming because television broadcast stations are the "most popular" programming on cable systems. *Id.* at 58. Exclusive arrangements between television stations and other multichannel providers -- especially market-

⁵ Rules defining such impermissible arrangements should be consistent with rules to be adopted in connection with the Cable Act's provisions guaranteeing multichannel video providers access to cable programming. See Notice of Proposed Rule Making, MM Docket No. 92-265, FCC 92-543, released December 24, 1992. The Consortium plans to file Comments in that proceeding specifically addressing program access standards.

dominant cable systems -- would severely undermine wireless cable operators' ability to compete. Likewise, permitting retransmission on unfair or discriminatory terms and conditions would create an imbalance in the marketplace. In order for wireless cable to offer the "diversity of views provided through multiple technology media" -- a policy Congress and the Commission have long sought to foster -- rules must be adopted to ensure that no cable operator secures the sole and exclusive rights to broadcast station programming as a condition for carriage pursuant to a retransmission consent agreement. Id. at 56.⁶

Adoption of rules prohibiting exclusive retransmission agreements and guaranteeing access on fair and non-discriminatory terms and conditions also would be consistent with Commission policies specifically designed to encourage the development of the wireless cable industry. Over the past four years, the Commission has instituted three separate rule making proceedings designed to promote wireless cable as a viable competitor to cable. In fact, wireless cable has been recognized as the technology best-positioned to offer competition to cable. See "Inquire Whose Son This Stripling Is...": The Growth and Future of Wireless Cable,

⁶ The Cable Act codified many of the recommendations contained in the Commission's Report, 5 FCC Rcd 4962 (1990) ("1990 Cable Report"), including retransmission consent. The 1990 Cable Report stated that "[w]here [cable] competition has yet to thrive, government should ... encourage fledgling competitors only so much as to overcome unfair barriers to entry." 1990 Cable Report at 4969. As described infra, the unavailability of local or distant television broadcast programming brought on by exclusive dealing between market dominant cable systems and broadcast stations would be one such unfair barrier to entry.

Remarks of Commissioner Ervin S. Duggan, July 23, 1992, at p. 4.

In Report and Order, 5 FCC Rcd 6410 (1990), the Commission adopted sweeping rule changes in an effort to promote wireless cable's competitive potential. The Commission stated that:

We anticipate that the rule and policy changes adopted here, and the additional modifications proposed here, will remove or reduce a number of barriers to the fullest possible development of wireless cable service. This result should enhance the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery market.

Id. at 6411. One year later, in Second Report and Order, 6 FCC Rcd 6792 (1991), the Commission promulgated rules making vacant ITFS spectrum available to wireless cable operators in certain circumstances. These rule changes were premised on the Commission's belief that access to additional spectrum would "spur further development of the wireless cable industry." Id. at 6802.

Now under consideration by the Commission is a Notice of Proposed Rule Making, PR Docket No. 92-80, FCC 92-173, released May 8, 1992, in which the Commission has proposed new rules designed to reduce MMDS application processing delays. The Commission stated that:

Wireless cable operators have been unable to gain access to the number of channels necessary for them to meet subscriber demand and match competitor's offerings. Meanwhile, the delays in the processing of MDS applications have allowed traditional cable systems to further strengthen their position in the multichannel video distribution marketplace, making the task of providing meaningful competition more difficult for rival operators.

Id. at 4 (footnote omitted).

Both Congress and the Commission have acted to promote

wireless cable as the most viable cable competitor likely to offer the consumer a diverse choice of video entertainment, news and educational services.⁷ In the absence of rules restricting exclusive, unfair or discriminatory arrangements,⁸ and in order to ensure access to the lion's share of the video distribution market, television stations would be tempted to enter into such arrangements or risk not being carried by the cable system. This could also have the effect of discouraging potential investors from investing in competing technologies such as wireless cable by allowing cable operators to unfairly slant the playing field in their favor.⁹

⁷ Some wireless cable systems, due to limited channel capacity, do not retransmit broadcast signals so that scarce channel capacity may be used for other programming. In these markets, subscribers receive local television signals on standard over-the-air antennas, and these signals are combined with the wireless cable channels. These systems are not "retransmitting," and thus the provisions of Section 325 of the Cable Act do not apply. The Consortium urges the Commission to make clear that retransmission consent is not necessary in these circumstances.

⁸ In order to ensure that the rules advocated by the Consortium are self-policing, certified or notarized copies of retransmission consent agreements should be placed in each television station's public file, along with the election statement referenced in the Notice. See Notice at p. 26, ¶51. Further, as proposed by the Commission, the Consortium submits that all such retransmission consent agreements be in writing. Id. at 28, ¶57.

⁹ At least one television broadcast station already has shown a willingness to deny a wireless cable operator the right to retransmit its signal. A broadcaster requested the wireless cable operator in Spokane, Washington to cease retransmitting its signal even though Section 325 of the Act is not effective until October 6, 1993.

Conclusion

The Consortium urges the Commission to promulgate rules and regulations that prohibit exclusive, unfair and discriminatory retransmission arrangements between television broadcast stations and multichannel distributors that effectively would deny or restrict wireless cable operators and other multichannel distributors from enjoying access to critical local news, public affairs and entertainment programming broadcast by television stations.

Respectfully submitted,

**THE CONSORTIUM OF CONCERNED
WIRELESS CABLE OPERATORS**

Date: January 4, 1993

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CERTIFICATE OF SERVICE

I, Elizabeth Sobo, a secretary in the law office of Rini & Coran, P.C., hereby certify that I have on this 4th day of January, 1993, sent via hand delivery, a copy of the foregoing Comments to the following:

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